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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1971

No. 71-138

PAUL DONAHUE, *Petitioner,*

VS.

CALIFORNIA JUSTICE COURT FOR THE KLAMATH-TRINITY JUDICIAL DISTRICT, *Respondent,*

THE PEOPLE OF THE STATE OF CALIFORNIA, *Real Party in Interest.*

OPPOSITION OF RESPONDENT TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the California Court of Appeal, entered February 24, 1971, is reported at 15 Cal.App.3d 557; the modification of the opinion, entered March 26, 1971, is reported at 16 Cal.App.3d 244(a). The opinion as modified is also reported in 93 Cal.Rptr. 310.

JURISDICTION

Petitioner invokes the jurisdiction of this Court under Title 28, United States Code section 1257(3).

QUESTIONS PRESENTED

1. Does California have jurisdiction to prosecute violations of its fish and game laws committed on an Indian reservation by a person who is not a member of the reservation tribe?

2. Does a person who is not a member of the Hoopa Tribe have standing to assert that California's enforcement of its fish and game laws on the Hoopa reservation infringes upon the fishing rights of that tribe?

STATEMENT OF THE CASE

By a complaint filed September 8, 1969, in the Justice Court for the Klamath-Trinity Judicial District of Humboldt County, petitioner Paul Franklin Donahue was charged with violating Fish and Game Code section 8603, in that he operated a gill net on the Trinity River, and with violating Fish and Game Code section 8686 in that he possessed a gill net with mesh larger than 1¾ inches in a prohibited district.

By a letter memorandum dated December 9, 1969, appellant requested the Justice Court to dismiss the complaint on the ground that the court had no jurisdiction over the alleged offense, which took place on the Hoopa Valley Indian Reservation. Appellant's request for dismissal was denied December 17, 1969.

On February 10, 1970, petitioner filed in the Humboldt County Superior Court an application for a writ of prohibition to restrain his prosecution on the above-described charges. By an order filed February

27, 1970, the Superior Court denied the petition. Notice of appeal was filed by petitioner on March 2, 1970.

On February 24, 1971, the California Court of Appeal affirmed the action of the Superior Court denying a writ of prohibition to halt the prosecution. Both sides petitioned for rehearing and modification, and the opinion was modified on March 26, 1971. A petition for hearing in the California Supreme Court was denied April 29, 1971.

STATEMENT OF FACTS

The facts of this case, which are derived from the uncontradicted allegations of petitioner's pleadings in the Superior Court, may be simply stated: Petitioner Paul Donahue is a California Indian, although he is not a member of the Hoopa Valley Tribe. On September 6, 1969, petitioner was fishing on that section of the Trinity River which flows through the Hoopa Valley Indian Reservation. The complaint alleges that he was fishing with a gill net with mesh larger than 1¾ inches. This conduct, if proven, violated sections 8603 and 8686 of the California Fish and Game Code.

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JURISDICTION

Petitioner invokes the jurisdiction of this Court under Title 28, United States Code section 1257(3).

REASONS WHY THE WRIT OF CERTIORARI SHOULD BE DENIED

Public Law 280 confers upon the California courts jurisdiction to prosecute violations of state law committed on an Indian Reservation except where such prosecutions would infringe upon rights previously granted by federal statute, agreement or treaty with the Indians. To the extent that the Hoopa Tribe has been granted fishing rights on the Hoopa Reservation, petitioner has failed to show how prosecuting a non-tribal member for violation of the state laws regulating fishing infringes upon the fishing rights of the Hoopa Tribe. Finally, petitioner is not a member of the Hoopa Tribe and has no standing to assert tribal rights.

ARGUMENT

I

BY VIRTUE OF PUBLIC LAW 280 CALIFORNIA HAS JURISDICTION TO PROSECUTE VIOLATIONS OF ITS FISH AND GAME LAWS ON THE HOOPA INDIAN RESERVATION

In contending that the state is without jurisdiction to try him for an offense committed on an Indian Reservation, appellant is first confronted with the provisions of Title 18, United States Code section 1162, which is part of Public Law 280. That section provides, in material part, as follows:

> "(a) Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name

of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

"State or Territory of	Indian country affected
. . . .	. . . .
"California	All Indian country within the State
. . . .	. . . .

"(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto, or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof."

In response to this legislation, California enacted section 12300 of the Fish and Game Code. That states:

"Irrespective of any other provision of law, the provisions of this [Fish and Game] code are not applicable to California Indians whose names are inscribed upon the tribal rolls, under those places

> and circumstances in this State where the code was not applicable to them immediately prior to the effective date of Public Law 280, Chapter 505, First Session, 1953, Eighty-third Congress of the United States.
>
> "No such Indian shall be prosecuted for the violation of any provision of this code occurring in the places and under the circumstances hereinabove referred to. Nothing in this section, however, prohibits or restricts the prosecution of any Indian for the violation of any provision of this code prohibiting the sale of any bird, mammal, fish, or amphibia."

That section, in effect, conferred an immunity on tribal Indians when hunting and fishing on their tribal reservation. Appellant cannot and does not claim immunity under Fish and Game Code section 12300, because he concedes that his name is not inscribed upon the tribal roll of the Hoopa Valley Tribe. However, he does assert a lack of state jurisdiction purportedly deriving from Title 18, United States Code section 1162(b), *i.e.*,

> "Nothing in this section . . . shall deprive any Indian or Indian tribe . . . of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping or fishing or the control licensing or regulation thereof."

Appellant's argument is premised on the notion that the Hoopa Valley Indian Reservation is a separate entity. This motion is unsound. Indian reservations have always been treated as geographically, politically and governmentally within the boundaries of

the state wherein they are located except to the extent that Congress has expressly provided otherwise. See *Acosta v. County of San Diego,* 126 Cal.App.2d 455, 563, 272 P.2d 92 (1954). And, "in unambiguous, terms, Public Law 280 withdrew federal jurisdiction over offenses committed in specified areas of Indian country by the grant of exclusive criminal jurisdiction to five designated states [including California]." *Anderson v. Gladden,* 293 F.2d 463, 466 (9th Cir. 1961); see also *People v. Rhoades,* 12 Cal.App.3d 720, 90 Cal. Rptr. 794 (1970), *cert. den.* 40 U.S.L.W. 3162 (Oct. 12, 1971).

The thrust of petitioner's argument seems to be this: that despite the state's grant to tribal Indians of immunity from prosecution for fish and game law violations, to prosecute someone who is not a Hoopa Indian for fishing on the Hoopa Reservation in a manner violative of California law as well as sound conservation practice, infringes upon the fishing rights of the Hoopa Valley Tribe. As thus stated the argument is absurd on its face.

Although petitioner does not clearly say so, his petition implies that the exercise of state criminal jurisdiction over non-tribal members would restrict the power of the Hoopa Tribe to enforce its fishing rights. This implication is wrong. The California courts have long been open to civil actions brought to vindicate private fishing rights. *Pacific etc. v. Packers' Assn.,* 138 Cal. 632, 72 Pac. 161 (1903); *Heckman v. Swett,* 107 Cal. 276, 40 Pac. 420 (1895). And by of Title 28, United States Code section 1360, the Hoopa Tribe may bring a civil action in the California courts for the infringe-

ment of its reservation fishing rights. California's exercise of criminal jurisdiction to prosecute persons other than tribal members for fishing law violations on the reservation in no way infringes upon the fishing rights of the Hoopa Tribe. To the contrary, it protects and enhances them, and petitioner's assertions otherwise are without merit.

II

PETITIONER LACKS STANDING TO ASSERT THE FISHING RIGHTS OF THE HOOPA TRIBE

Petitioner's application to this Court concludes with a plea that it "uphold the integrity of Indian reservations by granting this petition and reversing the decision of the California Court of Appeal." Pet. for Cert., p. 7. However, in documents filed in the California Court of Appeal, petitioner stated that he assumed for purposes of argument that as one not enrolled in the Hoopa Valley Tribe, he had no right to fish on the Hoopa Valley Reservation. Pet. for Modification and Reh., p. 1; Appellant's Reply Brief, p. 4 f.n. 2. His assumption in the Court of Appeal was unquestionably correct, for under Federal law, membership in a tribe is a prerequisite to the right to share in tribal property. *Halbert v. United States*, 283 U.S. 753, 762-63 (1931); Cohen, Handbook of Indian Law (1942), p. 185. Moreover, the Department of the Interior has consistently interpreted the presidential order setting aside the Hoopa Valley Reservation (Kappler, Indian Laws and Treaties, Vol. 1, p. 815 [1903]), as vesting property rights exclusively

in those Indians possessing membership in the Hoopa Valley Tribe. See, Rights of Indians in Hoopa Valley Reservation, California, 65 I.D. 59 (1958).[1] Of course, petitioner cannot represent before this Court a class of which he is not a part. See *Paul v. Beals,* 396 U.S. 45, 49 (1969); *Bailey v. Patterson,* 369 U.S. 31, 32-33 (1962); *New York ex rel. Cutler v. Dibble,* 21 How. 366, 371 (1858). Thus, petitioner's lack of standing is plain and, for purposes of this forum, conclusive.[2]

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

Dated, San Francisco, California,
October 27, 1971.

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[1]Citation is to the published reports entitled, "Decisions of the United States Department of Interior."

[2]As a practical matter, it is significant that the Hoopa Tribe, though aware of the opinion of the Court of Appeal, has declined to become involved in this litigation either by way of petition to the California appellate courts or to this Court. A fair conclusion to be drawn from this is that the tribe simply does not feel itself aggrieved by the prosecution of petitioner. Moreover, the fact that a decision by this Court allowing petitioner to violate the fish and game laws with immunity might have an adverse effect on the fishing rights of the Hoopa Tribe, is itself an additional reason for declining to entertain this petition.